NO. 47212-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL MCBEE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Edmund Murphy, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court violated the appellant's right to a unanimous jury verdict on one of the appellant's second degree assault convictions.

2. The parties agreed to dismiss one of the charges but the court failed to indicate such dismissal on the judgment and sentence.

Issues Pertaining to Assignment of Error

1. The appellant engaged in multiple acts of shooting at his neighbor and his neighbor's wife. The State charged the appellant with attempted murder of the neighbor based on those acts. The State also charged the appellant with the first degree assault of the neighbor's wife based on a theory of transferred intent. The jury convicted the appellant of the lesser degree offense of second degree assault as to the wife, necessarily rejecting the State's transferred intent theory.

The State did not elect which act constituted the assault of the wife, and the trial court did not give a unanimity instruction, violating the appellant's right to a unanimous jury verdict. Where the State cannot show the resulting error was harmless, should the appellant's second degree assault conviction and corresponding firearm enhancement conviction be reversed?

2. Should the judgment and sentence be corrected to reflect dismissal of count 6, second degree unlawful possession of a firearm (UPOF)?

B. STATEMENT OF THE CASE[1]

1. Charges, verdicts, and sentence

The State charged Michael McBee with attempted first degree murder and two counts of first degree assault (intent to inflict great bodily harm).[2] CP 1-2. The alleged victim as to the first count was McBee's neighbor Kevin Headland (count 1). CP 1. The alleged victims as to the assault charges were Kevin's wife, Debbie, and the Headlands' house guest, Steve Norman (counts 2 and 3). CP 2. The State relied on a theory of transferred intent as to counts 2 and 3, arguing McBee intended to harm Kevin rather than the named victims. 6RP 514-15; 8RP 727-29, 743-44. McBee was also charged with first degree burglary, second degree

[1] This brief refers to the verbatim reports as follows: 1RP – 3/20/14; 2RP – 4/14/14; 3RP – 4/15/14; 4RP – 4/21/14; 5RP – 4/22/14; 6RP – 4/23/14; 7A RP 4/24/14 (morning); 7B RP – 4/24/14 (afternoon); 8RP – 4/28, 4/29, and 5/1/14; and 9RP – 2/20/15 . The volumes are consecutively paginated except that 7B RP and 8RP contain duplicate page numbers. Thus, to avoid confusion, this brief identifies the volume number along with the page number.

[2] RCW 9A.36.011(1)(a) provides that "[a] person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm . . . [a]ssaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death."

malicious mischief, and second degree UPOF (counts 4-6) based on the same shooting incident. CP 2-4. The State alleged firearm enhancements as to each charge except count 6, UPOF. CP 1-4. The parties agreed to dismiss the charged based on insufficient evidence, and the court appeared to agree to that resolution. 6RP 531.

McBee asserted a diminished capacity defense at trial, which the State attempted to rebut with its own expert. 7B RP 668; CP 175 (instruction 8).

The jury convicted McBee of the lesser degree crime of second degree assault (assault with a firearm)[3] as to counts 2 and 3, but convicted him on counts 4 and 5, burglary and malicious mischief. CP 220, 223, 225, 227. The jury answered "yes" to special verdict forms asking if McBee was armed with a firearm during commission of those four crimes. CP 221, 224, 226, 228.

But the jury deadlocked on count 1, attempted murder, and the court declared a mistrial as to that charge. 8RP 796-808. McBee pleaded guilty to second degree assault, with no corresponding firearm enhancement, as to count 1. CP 233-42.

Rejecting McBee's request for an exceptional sentence downward, 9RP 842, 846-48, the court sentenced then-67-year-old McBee to 217

[3] RCW 9A.36.021(1)(c).

months of confinement, including concurrent standard range sentences totaling 67 months, plus consecutive firearm enhancements totaling 150 months, for a total of 217 months of confinement. CP 327.

McBee timely appeals. CP 274.

2. Trial testimony

Kevin Headland was McBee's neighbor and they did not get along. 3RP 168; 4RP 297. The afternoon of March 26, 2013, Kevin was driving home from work when he saw his former supervisor at Boeing, Steve Norman. 4RP 298-300. Norman was leaving his daughter's house, which was near Headland's residence. 4RP 300. Kevin invited Norman over for a beer. RP 300. Driving his own truck, Norman followed Kevin's sedan and parked in the Headlands' driveway, while Kevin pulled into his garage. 3RP 111, 117; 4RP 300-01.

Kevin and Norman drank their beers while admiring Kevin's new boat. 4RP 302-03. Meanwhile, Kevin's wife Debbie arrived home driving her red Lexus, which she parked in the driveway. 4RP 301.

The men went into the Headlands' garage and opened their second beers. 4RP 303. Norman sat on some steps leading up to the door between the attached garage and the residence. 4RP 303. Debbie lingered in the garage and chatted with Norman for a few minutes. 4RP 304. As Debbie turned to enter the house, Kevin, who was standing in front of the

beer refrigerator, heard a voice say, "Kevin, you are a dead MF." 4RP 306, 313.

McBee was standing about 20 feet away and held a gun in one hand. 4RP 306, 309, 315-16. He had "[b]ig eyes" and appeared disheveled. 4RP 306, 315; see also 4RP 330 (McBee's eyes were "big" and he was not wearing glasses). McBee fired into the garage.[4] 4RP 306. No one was injured; the shot instead struck the wall dividing the garage and the residence. 4RP 254. Kevin thought there was more than one shot, but ballistic evidence revealed a single shot was fired. 4RP 254, 306.

Kevin believed he was McBee's intended victim. Based on the angle at which McBee held the gun, Kevin believed McBee had originally intended a head shot, but was surprised by additional people in the garage. 4RP 309.

Kevin dropped to the ground in front of his car at approximately the same time the shot was fired. 4RP 306, 309. He rolled to the side and felt Norman, who was also trying to hide. 4RP 306. Kevin escaped through a side door and ran along the side of the residence. 4RP 306. He

[4] A neighbor saw McBee walk toward the Headlands' residence, raise a gun, and shoot from the end of the driveway into the garage. 5RP 409, 411. McBee then lowered the gun and walked into the garage. 5RP 409. Some time later, the neighbor heard additional shooting. 5RP 415. After the shooting ceased, he saw McBee walking back to his house looking as if he "felt . . . terrible" about what had occurred. 5RP 413, 418.

heard additional shots and, looking down, saw a bullet tear through the grass.[5] 4RP 306. Kevin ran though his neighbor's yard and used the neighbor's phone to call 9-1-1. 4RP 307-08. Three to seven minutes later, Kevin heard gun fire from the direction of his residence. 4RP 308. Kevin never re-entered his residence during his flight from McBee. 4RP 326.

Kevin also testified that eight days before the shooting incident, he and McBee were involved in an altercation. McBee allowed his dog to wrap its leash around Kevin's legs. McBee then poked Kevin in the face. 4RP 317-18, 331.

Kevin punched McBee, which caused McBee to fall and break his glasses. 4RP 318, 331-32. McBee called the police but no one was arrested and no charges were filed. 4RP 319-21; see also 5RP 435 (testimony of deputy who responded to both incidents).

Steve Norman also testified at trial. He was helping his daughter remodel her kitchen when Kevin drove by and invited him over for a beer. 3RP 110. After the viewing of the boat, Kevin invited Norman to stay for another beer. 3RP 116.

Meanwhile, Kevin's wife Debbie arrived at home and chatted with the men. 3RP 116. Debbie sat in a chair, Kevin stood in front of his car,

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[5] Another neighbor saw Kevin run though his yard. The neighbor saw McBee following, moving more slowly and struggling but appearing "very determined," while continuing to fire at Kevin. 5RP 387-88, 395.

while Norman, who had been sitting on the stairs into the residence, stood near Debbie. 3RP 118, 121.

Suddenly, an unknown man with "wild eyes" rounded the corner of the garage behind Kevin's car. 3RP 117, 140-41. Stating, "You are a dead mother fucker," the man fired a shot toward Norman's head. 3RP 118, 144-45. The shot hit the wall between Norman and Kevin. 3RP 146-47; but see 3RP 118-19, 113-35 (testimony that shot struck wall on *other* side of Norman). Kevin ducked in front of his car and then escaped through a side door. 3RP 119, 136. The shooter called out to Kevin. 3RP 119.

Norman was at a loss for what to do. He tried to follow Debbie, who had "sprinted" into the residence, but that door was locked. 3RP 119, 136. He decided to follow Kevin through the side door. When he turned, however, the shooter was pointing the gun at his face. 3RP 119. Norman pleaded, "Please don't." 3RP 120. At that point, it seemed to occur to the man that he did not know Norman. The man stated, "Get the fuck out of here." 3RP 120. Norman said, "[y]ep," and walked past the man and out the garage door. 3RP 120.

Norman called the police from another neighbor's home. 3RP 120. He heard additional shots after leaving the garage. 3RP 120, 124, 126.

Debbie Headland had known McBee since he helped the Headlands build their home a number of years before the incident. 3RP 167, 198. As of 2013, Debbie was still friends with McBee, but Kevin and McBee were on poor terms. 3RP 168.

Debbie arrived home the day of the incident, parked in the driveway, and entered the garage through the side door. 3RP 180. She greeted Norman briefly, then went into the house to make dinner. 3RP 180. Hearing gunfire, Debbie looked out the window and saw Kevin running along the side of the house. 3RP 180. Debbie was "99.9 percent" sure she was not in the garage when the shots were fired. 3RP 181.

After seeing Kevin run by, she dialed 9-1-1. Meanwhile, she heard a few more shots. 3RP 182. As Debbie stood in her living room talking to the 9-1-1 operator, she saw McBee (who was standing in the yard) place two hands on his gun and shoot toward the sliding glass door into the living room. 3RP 184, 193-94, 202. The door shattered, and Debbie heard a bullet ricochet around the room. 3RP 185.

Debbie thought McBee may have been aiming at her when he shot out the door. 3RP 189. There was nothing to block McBee's view through the door. 3RP 193-94. She surmised the bullet did not hit her because she ducked or because the glass somehow protected her. 3RP 189. She also testified, however, that she believed McBee was attempting

to follow Kevin into the residence. 3RP 202, 206. In addition, she testified that when McBee fired, he was a significant distance from the door. 3RP 194.

Gun in hand, McBee walked into the residence and asked Debbie who she was talking to. 3RP 185, 188. She told him it was the 9-1-1 operator; she also asked if he wanted to give his name to the operator and tried to hand the phone to him. McBee responded, "Get that out of here." 3RP 188.[6]

McBee then went to the master bedroom door, which was locked, and shook the handle as if trying to enter the bedroom. 3RP 185. Debbie tapped McBee on the shoulder and asked what he was doing. 3RP 185. McBee said, "I am going to kill the son of a bitch." Debbie told McBee, "No you are not, Michael." McBee replied, "Yes I am." 3RP 188. Still holding the gun, McBee spun around toward Debbie, who ducked because she did not know what he intended to do. 3RP 186. McBee went into another bedroom and again asked, "Where is the son of a bitch?" 3RP 185. Debbie estimated McBee was in the house about five minutes. 3RP 186. He eventually left through the shattered door. 3RP 188. Debbie thought McBee was intoxicated. 3RP 187.

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[6] McBee can be heard on the 9-1-1 call recordings stating that he is searching for "the coward," i.e., Kevin. 8RP 669.

Debbie originally told officers, and initially believed, that Kevin had run into the residence and locked the master bedroom door.[7] 3RP 196-97, 206. At the time of trial, she no longer believed Kevin had come into the residence. 3RP 195, 202.

Debbie had suffered a brain injury 11 years earlier that affected her memory. 3RP 192. On the stand, she acknowledged she suffered from long-term memory loss, but later denied suffering from long-term memory loss and said she instead suffered from short-term memory loss. 3RP 197. She acknowledged, however, that her memory was "sketchy" at times. 3RP 197.

Steven Mell, a forensic investigator with the Pierce County Sheriff's Office, testified a bullet struck the garage wall, passed through the wall between the garage and the kitchen, and struck the back of the refrigerator. 4RP 254-58. Mell also identified a bullet strike on the carport, a "trench" likely to have been caused by that bullet, and two bullets (as well as three separate bullet strikes) to Debbie's Lexus. 4RP 258-63. Investigators also found a bullet on the couch in the Headlands' living room. 4RP 249. Police found an operable 9mm pistol at McBee's residence that, according to the State's firearms expert, had fired the

[7] Debbie did not know how the bedroom door came to be locked, although the bedroom did have an exit to the exterior of the house. 3RP 204.

bullets and ejected the shell casings police had located. 4RP 270; 5RP 478-79, 483.

Psychologist Dr. Joseph Nevotti, the defense's mental health expert, testified that McBee suffered from a number of serious mental disorders that could have impaired his ability to form the intent to commit the charged crimes. 7A RP 620; 7B RP 668. These included post-traumatic stress disorder from military service, long-term alcoholism and depression, and cognitive deficits (as well as personality changes) resulting from brain damage suffered as a complication of routine surgery years earlier. E.g., 7A RP 582-83, 586-95, 602, 608-13, 614-17; 7B RP 656, 684, 693-97. McBee was also heavily intoxicated throughout the incident. 7A RP 612; 7B RP 653, 690-91. Dr. Nevotti opined McBee's memory, mental organization, and ability to obtain and screen information were likely impaired at the time of the incident. 7A RP 620-23.

The State presented the testimony of a competing mental health expert, Dr. Les Hutchins. 7B RP 700. Hutchins agreed with many of Nevotti's mental health diagnoses. 8RP 649-51, 672. But he opined that McBee was able to form the intent to commit each of the crimes because he had engaged in other goal-directed behavior the day of the incident. 8RP 643-44, 664, 668, 673, 677-78, 684, 687-89, 689.

During the Hutchins evaluation, McBee said he remembered portions of the incident, including: leaving his house with a pistol, being called a "crazy fucking bastard" by Kevin, and going out the side door of the Headlands' garage. McBee also recalled seeing Debbie sitting on the couch. He recalled the glass breaking, entering into the house, and Debbie asking him why he was "doing this." 8RP 657-58. He also ostensibly recalled shooting three bullets into the trunk of *Kevin*'s car because Kevin liked cars and McBee wanted to Kevin to feel bad. 8RP 658.

3. State's closing argument

The State argued in closing that McBee acted intentionally in committing the charged crimes. E.g. 8RP 741-44, 751. McBee would have been aware that Kevin and Debbie had come home, because their cars were parked in or near the garage. 8RP 725. McBee, not wearing his glasses at the time, came around the corner, announced "I am going to kill you," and fired at the first person he saw. 8RP 725. That happened to be Steve Norman, as indicated by the location of the bullet hole in the garage wall. 8RP 726-27.

According to the prosecutor, the evidence indicated McBee was guilty of the first degree assault of Norman because thought he was shooting at Kevin, and his actions indicated he intended to kill Kevin.

8RP 727-28. The prosecutor acknowledged the testimony differed as to whether Debbie was in the garage at the time of that shooting. 7RP 326.

The prosecutor also noted, however, that McBee approached Steve Norman after the initial shot. Once McBee realized Norman was not Kevin, he told Norman to leave. 8RP 728. The prosecutor argued that when McBee put a gun to Norman's head and told him to leave, he assaulted Norman, provided that he intended to create apprehension and fear in Norman. 8RP 740. Thus, McBee had, at a minimum, committed second degree assault against Norman. 8RP 740-41.

After that, McBee persisted in his attempt to kill Kevin by attempting to follow Kevin. 8RP 729, 731, 744. Still pursuing Kevin, McBee "blasted" out the back door of the residence. McBee was still after Kevin at the time; however, Debbie happened to be in the line of fire when he shot out the door. 8RP 743.

C. ARGUMENT

1. MCBEE'S RIGHT TO A UNANIMOUS JURY VERDICT WAS VIOLATED BECAUSE THE STATE DID NOT ELECT WHICH ACT CONSTITUTED THE ASSAULT ON DEBBIE HEADLAND AND THE TRIAL COURT FAILED TO GIVE A NECESSARY UNANIMITY INSTRUCTION.

The court violated McBee's right to a unanimous jury verdict as to count 2, the assault of Debbie Headland, because the evidence adduced at

trial described at least two distinct acts of shooting involving Debbie. The State did not elect which act it was relying on, and the court did not instruct the jury it must unanimously agree on the act constituting the charged crime. Finally, the omission of such an instruction was not harmless beyond a reasonable doubt. Reversal is therefore required.

a. The law of assault

A person is guilty of second degree assault when, "under circumstances not amounting to assault in the first degree . . . he [a]ssaults another with a deadly weapon." RCW 9A.36.021(1)(c); CP 193 (instruction 26, definition of second degree assault); CP 194 (instruction 27, lesser degree to-convict as to count 2); CP 200 (instruction 33, lesser degree to-convict as to count 3).

"Assault" is not defined by statute. Rather, Washington relies on the following three common law definitions:

> An assault is an intentional touching, striking, cutting, or shooting of another person, with unlawful force, that is harmful or offensive regardless of whether any physical injury is done to the person. A touching, striking, cutting, or shooting is offensive, if the touching, striking, cutting, or shooting would offend an ordinary person who is not unduly sensitive.
>
> An assault is also an act, with unlawful force, done with intent to inflict bodily injury upon another, tending, but failing to accomplish it and accompanied with the apparent present ability to inflict the bodily injury if not prevented. It is not necessary that bodily injury be inflicted.

> An assault is also an act, with unlawful force, done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

State v. Smith, 159 Wn.2d 778, 781-82, 154 P.3d 873 (2007). The court instructed the jury on each of these three definitions in this case, although the first definition, corresponding to battery at common law, was limited to "shooting" of another person. CP 189 (instruction 22).

Specific intent is defined as intent to produce a specific result, as opposed to intent to do the physical act that produces the result. State v. Elmi, 166 Wn.2d 209, 215, 207 P.3d 439 (2009). Specific intent either to (1) create *apprehension* of bodily harm or (2) cause bodily harm is an essential element of second degree assault. State v. Byrd, 125 Wn.2d 707, 713, 887 P.2d 396 (1995) (quoting Wayne R. LaFave & Austin W. Scott, Jr., Criminal Law 611 (1972)).

b. The law of jury unanimity

Criminal defendants in Washington have a right to a unanimous jury verdict. Const. art. I, § 21. When the State presents evidence of multiple acts that could constitute a charged crime, "the State must tell the jury which act to rely on in its deliberations or the [trial] court must instruct the jury to agree on a specific criminal act." State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d

105 (1988); State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984), overruled on other grounds by Kitchen, 110 Wn.2d 403. The State's failure to elect the act, coupled with the court's failure to instruct the jury on unanimity, is constitutional error. Kitchen, 110 Wn.2d at 411. "The error stems from the possibility that some jurors may have relied on one act or incident and some another, resulting in a lack of unanimity on all of the elements necessary for a valid conviction." Id. Such an error may be raised for the first time on appeal as a manifest error affecting a constitutional right. State v. Holland, 77 Wn. App. 420, 424, 891 P.2d 49 (1995).

The State need not elect, and the court need not give a unanimity instruction, however, if the evidence shows the accused was engaged in a "continuing course of conduct." State v. Handran, 113 Wn.2d 11, 17, 775 P.2d 453 (1989). Courts have considered various factors in determining whether a continuing course of conduct, rather than multiple acts, exists in a particular case. Evidence that the charged conduct occurred at different times and places tends to show that several distinct acts occurred. In contrast, evidence that an offense involves a single victim, or that an accused engages in a series of acts toward the same objective, supports the characterization of those acts as a continuing course of conduct. Id.; see also State v. Hanson, 59 Wn. App. 651, 657, 800 P.2d 1124 (1990) (question is whether the evidence discloses more than one violation of the statute in question).

In Handran, two arguably assaultive acts did not require a unanimity instruction because they were part of a course of conduct intended to secure sexual intercourse with a single victim. Id. In State v. Fiallo-Lopez, Fiallo argued the trial court should have given a unanimity instruction on the charge of delivery of cocaine. 78 Wn. App. 717, 723, 899 P.2d 1294 (1995). He argued the evidence showed two discrete acts of delivering cocaine, delivery of a "sample" to a restaurant and a later delivery of baggies of cocaine at a second location. Id. at 725. The Court disagreed, holding the two deliveries of cocaine were a continuing course of conduct, i.e., one continuous delivery of drugs by Fiallo to the same recipient. Id. at 725-26.

In State v. King, however, the Court held that failure to give unanimity instruction was reversible error where State's evidence tended to show two distinct episodes of cocaine possession occurring at different times, in different places, and involving two different containers. 75 Wn. App. 899, 903-04, 878 P.2d 466 (1994), review denied, 125 Wn.2d 1021 (1995). In Petrich, the Court similarly rejected the State's argument that multiple acts constituted a continuing course of conduct argument insulating the case from a challenge to jury unanimity. Petrich was charged with one count of indecent liberties and one count of second degree statutory rape. 101 Wn.2d 566. Each incident occurred at a separate time and place. The only

connection between the incidents was the victim. Id. at 571. And the Court could not find the error harmless, it reversed. Id. at 573.

c. The court violated McBee's right to a unanimous jury verdict because the two possible assaults of Debbie Headland did not represent a continuing course of conduct.

This case is more like Petrich and King than Handran or Fiallo-Lopez. Although relatively close in time, there were two distinct assaults the jury may have relied on in convicting McBee of the lesser degree offense of second degree assault as to Debbie. The evidence, taken in the light most favorable to McBee for purposes of this argument, indicates the assaults had two different objectives. Considered in this light, the first assault, in the garage, was undertaken to frighten everyone in the garage. The second assault, occurring in the living room, was undertaken to harm or frighten Debbie. See Hanson, 59 Wn. App. at 656 n.6 (to discern whether the evidence is such that jurors could find more than one event sufficient to convict, court must view evidence in the light most favorable to the State. In other words, "to view the evidence in the light most favorable to the defendant, it is necessary to view it in the light most favorable to the State.").

The State may argue that the fact that McBee was pursuing Kevin provides a unifying objective rendering the acts a single course of conduct,

and a single violation of the assault statute. Any such argument should be rejected. The instructions, as proposed by the State and given by the court, did not permit the jury to transfer intent from Kevin to Debbie to find McBee guilty of the lesser offense of second degree assault of Debbie.

Consistent with the State's theory of the case, and over defense objection,[8] the jury was instructed on the doctrine of transferred intent as follows: "If a person acts with intent to inflict great bodily harm on one person, the actor is also deemed to have acted with intent to inflict great bodily harm on the third person." CP 198 (instruction 31); see also 8RP 699 (prosecutor's proposal of "simplified" transferred intent instruction addressing only intent to inflict great bodily harm).

The court thus instructed the jury that it could transfer intent only as to the charged crime, first degree assault, rather than the lesser degree crime of second degree assault. The jury was not, for example, instructed that it could transfer some lesser intent to injure or create apprehension of harm in a third party. These instructions, allowing transferred intent to inflict great bodily harm only, became the law of the case. State v. Perez-

[8] 6RP 514-24; 8RP 97-713, 718-19.

Cervantes, 141 Wn.2d 468, 476, 6 P.3d 1160 (2000) (citing State v. Ng, 110 Wn.2d 32, 39, 750 P.2d 632 (1988)).[9]

Under the instructions as provided, the jury could not have found the second degree assault of either Debbie Headland or Steve Norman based on intent to assault Kevin Headland. Thus, this Court should reject that the two possible assaults of Debbie reflected McBee's continuing desire to harm or frighten Kevin.

The result of the inquiry is no different under State v. Villanueva-Gonzalez, 180 Wn.2d 975, 329 P.3d 78 (2014), which examined the nature of assault in the context of a double jeopardy challenge under a "unit of prosecution" theory. The question, in applying the unit of prosecution test to assault convictions, is whether multiple assault acts constitute one, or more than one, violation of the assault statute. Id. at 985. The Court identified the following factors for making this determination: (1) the length of time over which the assaultive acts took place; (2) whether the

[9] This Court, therefore, need not address the more complicated question of whether, in the context of second degree assault, transferred intent applies to an assault that does not actually inflict bodily harm. See Elmi, 166 Wn.2d at 221 (Madsen, J., dissenting, questioning applicability of transferred intent doctrine where unintended victim was not injured); cf. State v. Wilson, 113 Wn. App. 122, 131, 52 P.3d 545 (2002) (in case where bystander suffered bullet wound, holding that transferred intent is indeed applicable to second degree assault charges) (citing State v. Clinton, 25 Wn. App. 400, 606 P.2d 1240 (1980)).

assaultive acts took place in the same location; (3) the defendant's intent or motivation for the different assaultive acts, (4) whether the acts were uninterrupted, or if there were any intervening acts or events, and (5) whether there was an opportunity for the defendant to reconsider his actions. Id. No one factor is dispositive, and the ultimate determination of whether multiple assaultive acts constitute one course of conduct depends on the totality of the circumstances. Id.

Applying these factors to the facts of that case, the Court reasoned:

> First, the assaultive actions for which [Villanueva-Gonzalez] was charged—head butting the victim and then grabbing her neck and holding her against some furniture—took place in the same location. Second, the record implies (although does not clearly state) that the actions took place over a short time period, and there is no indication in the record of any interruptions or intervening events. Similarly, there is no evidence that would suggest that he had a different intention or motivation for these actions or that he had an opportunity to reconsider his actions. Based on the evidence in the record before us, *we conclude that Villanueva-Gonzalez's actions constituted a single course of conduct*. Therefore, we affirm the Court of Appeals and hold that his two assault convictions violated double jeopardy.

Id. at 985-86 (emphasis added).

Here, the Villanueva-Gonzalez factors suggest the opposite result. Although the shootings occurred relatively close in time (factor 1), they occurred in different locations (factor 2). Moreover, McBee had the opportunity to interact with (and decide not to shoot) Steve Norman

between the shootings in the garage and the living room (factors 4 and 5). Although the jury could have convicted McBee of assaulting Debbie (even absent transferred intent) based on the initial shot in the garage, Hanson, 59 Wn. App. at 656 n.6, it appears more likely he was after Kevin at that point. Thus, for jurors to find assault based on the intent to frighten or harm Debbie, McBee's objective would likely have changed (factor 3).

In summary, under either test employed above, the two separate acts that could have supported the count 2 verdict do not represent a continuing course of conduct. There was no election in closing. The court was required to instruct the jury that it was required to agree on a specific criminal act, but it did not do so.

d. The State cannot prove the error was harmless beyond a reasonable doubt.

The error was not harmless beyond a reasonable doubt. The failure to give a unanimity instruction in a multiple acts case is of constitutional magnitude and will be deemed harmless only if no rational trier of fact could have a reasonable doubt as to whether each incident established the crime beyond a reasonable doubt. Hanson, 59 Wn. App. at 659. A rational juror could have harbored a reasonable doubt as to whether McBee was guilty of assaulting Debbie during either of the two episodes.

First, the testimony was inconsistent as to whether Debbie was in the garage at all at the time of the first shooting. The men thought Debbie was in the garage or just leaving the garage. 3RP 121; 4RP 306. Debbie testified she was not in the garage, but Debbie's testimony made it clear she suffered from her own mental difficulties. 3RP 180-81, 192, 197.

Second, the jury could have had harbored serious doubts about whether McBee intended to assault Debbie as she sat in the living room. The jury heard evidence McBee and Debbie were on good terms despite the bitter animosity between McBee and Kevin. 3RP 168. The jury could have found McBee's objective was to pursue Kevin into the residence, not to frighten or harm Debbie, and therefore McBee did not intentionally assault Debbie. 3RP 185, 202, 206. A number of other factors could also create reasonable doubt as to intent to harm or frighten Debbie: McBee shot through a window, from a distance (3RP 194); the evidence showed (and the State argued) he was not wearing glasses at the time (4RP 330); and finally, after firing the shot he interacted in a relatively non-aggressive way with Debbie for a number of minutes (3RP 185-88).

A juror could have had a reasonable doubt as to either incident that could have supported the assault charge. Because the State cannot meet the test for harmless error, the assault conviction as to Debbie Headland

(and the corresponding firearm enhancement) should be reversed. Hanson, 59 Wn. App. at 660.

2. THE TRIAL COURT FAILED TO ENTER A WRITTEN DISMISSAL OF COUNT 6 ON THE JUDGMENT AND SENTENCE.

The parties informed the court they had agreed to dismiss count 6, the UPOF charge. The court appeared to agree that was appropriate. 6RP 531. The judgment and sentence, which contains a blank space for the court to list dismissed charges, does not mention the charge. CP 384.

This Court should remand for amendment of the judgment and sentence to reflect the agreed dismissal of count 6. State v. Calhoun, 163 Wn. App. 153, 170, 257 P.3d 693 (2011) (citing State v. Moten, 95 Wn. App. 927, 929, 935, 976 P.2d 1286 (1999)), review denied, 173 Wn.2d 1018 (2012).

Written dismissal is necessary and beneficial for all parties. It is in the interest of the appellant as well as the State that dismissal of the charges be clearly reflected in the judgment and sentence and not buried in lengthy transcripts.

D. CONCLUSION

This Court should reverse count 2, the second degree assault conviction and the corresponding firearm enhancement. The conviction violates the appellant's right to jury unanimity. In any event, this Court should remand for a written order dismissing the UPOF charge

DATED this 19TH day of August, 2015.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

JENNIFER WINKLER
WSBA No. 35220
Office ID No. 91051

Attorneys for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
vs.	)	COA NO. 47212-1-II
	)	
MICHAEL McBEE,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 19TH DAY OF AUGUST, 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] MICHAEL McBEE
DOC NO. 222447
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 19TH DAY OF AUGUST, 2015.

X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

August 19, 2015 - 3:15 PM

Transmittal Letter

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Court of Appeals Case Number: 47212-1

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